

AMENDMENT TO H.R. 2723

**OFFERED BY MR. NORWOOD OF GEORGIA (FOR
HIMSELF, MR. DINGELL OF MICHIGAN, MR.
GANSKE OF IOWA, AND MR. BERRY OF AR-
KANSAS)**

Page 96, strike line 20 and all that follows through
line 15 on page 101 and insert the following (and con-
form the table of contents accordingly):

1 **SEC. 302. ERISA PREEMPTION NOT TO APPLY TO CERTAIN**
2 **ACTIONS INVOLVING HEALTH INSURANCE**
3 **POLICYHOLDERS.**

4 (a) IN GENERAL.—Section 514 of the Employee Re-
5 tirement Income Security Act of 1974 (29 U.S.C. 1144)
6 is amended by adding at the end the following subsections:

7 “(e) PREEMPTION NOT TO APPLY TO CERTAIN AC-
8 TIONS ARISING OUT OF PROVISION OF HEALTH BENE-
9 FITS.—

10 “(1) NON-PREEMPTION OF CERTAIN CAUSES OF
11 ACTION.—

12 “(A) IN GENERAL.—Except as provided in
13 this subsection, nothing in this title shall be
14 construed to invalidate, impair, or supersede
15 any cause of action by a participant or bene-
16 ficiary (or the estate of a participant or bene-

1 ficiary) under State law to recover damages re-
2 sulting from personal injury or for wrongful
3 death against any person—

4 “(i) in connection with the provision
5 of insurance, administrative services, or
6 medical services by such person to or for
7 a group health plan as defined in section
8 733), or

9 “(ii) that arises out of the arrange-
10 ment by such person for the provision of
11 such insurance, administrative services, or
12 medical services by other persons.

13 “(B) LIMITATION ON PUNITIVE DAM-
14 AGES.—

15 “(i) IN GENERAL.—No person shall be
16 liable for any punitive, exemplary, or simi-
17 lar damages in the case of a cause of ac-
18 tion brought under subparagraph (A) if—

19 “(I) it relates to an externally
20 appealable decision (as defined in sub-
21 section (a)(2) of section 103 of the
22 Bipartisan Consensus Managed Care
23 Improvement Act of 1999);

1 “(II) an external appeal with re-
2 spect to such decision was completed
3 under such section 103;

4 “(III) in the case such external
5 appeal was initiated by the plan or
6 issuer filing the request for the exter-
7 nal appeal, the request was filed on a
8 timely basis before the date the action
9 was brought or, if later, within 30
10 days after the date the externally ap-
11 pealable decision was made; and

12 “(IV) the plan or issuer complied
13 with the determination of the external
14 appeal entity upon receipt of the de-
15 termination of the external appeal en-
16 tity.

17 The provisions of this clause supersede any
18 State law or common law to the contrary.

19 “(ii) EXCEPTION.—Clause (i) shall
20 not apply with respect to damages in the
21 case of a cause of action for wrongful
22 death if the applicable State law provides
23 (or has been construed to provide) for
24 damages in such a cause of action which
25 are only punitive or exemplary in nature.

1 “(C) PERSONAL INJURY DEFINED.—For
2 purposes of this subsection, the term ‘personal
3 injury’ means a physical injury and includes an
4 injury arising out of the treatment (or failure
5 to treat) a mental illness or disease.

6 “(2) EXCEPTION FOR GROUP HEALTH PLANS,
7 EMPLOYERS, AND OTHER PLAN SPONSORS.—

8 “(A) IN GENERAL.—Subject to subpara-
9 graph (B), paragraph (1) does not authorize—

10 “(i) any cause of action against a
11 group health plan or an employer or other
12 plan sponsor maintaining the plan (or
13 against an employee of such a plan, em-
14 ployer, or sponsor acting within the scope
15 of employment), or

16 “(ii) a right of recovery, indemnity, or
17 contribution by a person against a group
18 health plan or an employer or other plan
19 sponsor (or such an employee) for damages
20 assessed against the person pursuant to a
21 cause of action under paragraph (1).

22 “(B) SPECIAL RULE.—Subparagraph (A)
23 shall not preclude any cause of action described
24 in paragraph (1) against group health plan or
25 an employer or other plan sponsor (or against

1 an employee of such a plan, employer, or spon-
2 sor acting within the scope of employment) if—

3 “(i) such action is based on the exer-
4 cise by the plan, employer, or sponsor (or
5 employee) of discretionary authority to
6 make a decision on a claim for benefits
7 covered under the plan or health insurance
8 coverage in the case at issue; and

9 “(ii) the exercise by the plan, em-
10 ployer, or sponsor (or employee) of such
11 authority resulted in personal injury or
12 wrongful death.

13 “(C) EXCEPTION.—The exercise of discre-
14 tionary authority described in subparagraph
15 (B)(i) shall not be construed to include—

16 “(i) the decision to include or exclude
17 from the plan any specific benefit;

18 “(ii) any decision to provide extra-con-
19 tractual benefits; or

20 “(iii) any decision not to consider the
21 provision of a benefit while internal or ex-
22 ternal review is being conducted.

23 “(3) FUTILITY OF EXHAUSTION.—An individual
24 bringing an action under this subsection is required
25 to exhaust administrative processes under sections

1 102 and 103 of the Bipartisan Consensus Managed
2 Care Improvement Act of 1999, unless the injury to
3 or death of such individual has occurred before the
4 completion of such processes.

5 “(4) CONSTRUCTION.—Nothing in this sub-
6 section shall be construed as—

7 “(A) permitting a cause of action under
8 State law for the failure to provide an item or
9 service which is specifically excluded under the
10 group health plan involved;

11 “(B) as preempting a State law which re-
12 quires an affidavit or certificate of merit in a
13 civil action; or

14 “(C) permitting a cause of action or rem-
15 edy under State law in connection with the pro-
16 vision or arrangement of excepted benefits (as
17 defined in section 733(c)), other than those de-
18 scribed in section 733(c)(2)(A).

19 “(f) RULES OF CONSTRUCTION RELATING TO
20 HEALTH CARE.—Nothing in this title shall be construed
21 as—

22 “(1) permitting the application of State laws
23 that are otherwise superseded by this title and that
24 mandate the provision of specific benefits by a group
25 health plan (as defined in section 733(a)) or a mul-

1 tiple employer welfare arrangement (as defined in
2 section 3(40)), or

3 “(2) affecting any State law which regulates the
4 practice of medicine or provision of medical care, or
5 affecting any action based upon such a State law.”.

6 (b) EFFECTIVE DATE.—The amendment made by
7 subsection (a) shall apply to acts and omissions occurring
8 on or after the date of the enactment of this Act from
9 which a cause of action arises.

10 **SEC. 303. LIMITATIONS ON ACTIONS.**

11 Section 502 of the Employee Retirement Income Se-
12 curity Act of 1974 (29 U.S.C. 1132) is amended by adding
13 at the end the following new subsection:

14 “(n)(1) Except as provided in this subsection, no ac-
15 tion may be brought under subsection (a)(1)(B), (a)(2),
16 or (a)(3) by a participant or beneficiary seeking relief
17 based on the application of any provision in section 101,
18 subtitle B, or subtitle D of title I of the Bipartisan Con-
19 sensus Managed Care Improvement Act of 1999 (as incor-
20 porated under section 714).

21 “(2) An action may be brought under subsection
22 (a)(1)(B), (a)(2), or (a)(3) by a participant or beneficiary
23 seeking relief based on the application of section 101, 113,
24 114, 115, 116, 117, 119, or 118(3) of the Bipartisan Con-
25 sensus Managed Care Improvement Act of 1999 (as incor-

1 porated under section 714) to the individual circumstances
2 of that participant or beneficiary, except that—

3 “(A) such an action may not be brought or
4 maintained as a class action; and

5 “(B) in such an action, relief may only provide
6 for the provision of (or payment of) benefits, items,
7 or services denied to the individual participant or
8 beneficiary involved (and for attorney’s fees and the
9 costs of the action, at the discretion of the court)
10 and shall not provide for any other relief to the par-
11 ticipant or beneficiary or for any relief to any other
12 person.

13 “(3) Nothing in this subsection shall be construed as
14 affecting any action brought by the Secretary.”.

Page 102, line 20, and page 103, line 10, insert
“303,” after “301,”.